

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE A. FELIX

Claimant

VS.

DEFFENBAUGH DISPOSAL INC.

Respondent

AND

FIDELITY & GUARANTY INSURANCE

Insurance Carrier

Docket No. 1,025,914

ORDER

Claimant requested review of the December 5, 2006, Award and the December 11, 2006, Nunc Pro Tunc entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on March 6, 2007.

APPEARANCES

Daniel L. Smith, of Overland Park, Kansas, appeared for the claimant. Steven C. Alberg, of Olathe, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident arising out of and in the course of his employment with respondent. The ALJ concluded that the opinion of Dr. Michael Hall was more credible than the opinion of Dr. Edward Prostic and found that claimant had a 2 percent permanent partial impairment for loss of use of the right arm.

Claimant requests that the ALJ's finding that he met with personal injury by accident arising out of and in the course of his employment with respondent be affirmed. He argues, however, that the medical impairment opinion of Dr. Hall is unreliable and incompetent. Claimant contends that Dr. Hall's 2 percent impairment rating is based on findings made at an examination that Dr. Hall did not attend, that Dr. Hall's opinion that claimant had no impairment as of the date of his examination in September 2006 is not credible as claimant continued to suffer symptoms of medial epicondylitis, and that Dr. Hall's proposal for further medical treatment of claimant's condition is inconsistent with a finding of no impairment. Claimant requests the Board find that Dr. Prostic's impairment rating of 10 percent to the right upper extremity is supported by the greater weight of the evidence.

Respondent argues that claimant suffered only a temporary injury working for respondent that is not ratable under the AMA *Guides*¹ and that claimant suffered an intervening injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a mechanic. He was injured on August 24, 2005, when he used a 20 to 25 pound sledgehammer to knock out a U-joint from a drive shaft. It took him about 30 minutes to knock the U-joint loose, and by that time he was feeling pain in his right elbow and arm. He reported the injury to his supervisor. His supervisor told him to discuss the matter with the night shift supervisor, who handled worker compensation claims for respondent. It was the next day before claimant visited with the night shift supervisor.

On September 7, 2005, claimant was sent by respondent to Concentra Medical Center, where he was seen by Dr. James Walker. Claimant's elbow was swollen, and it looked like there was a knot in the lower part of the elbow. Dr. Walker testified that claimant did not have a lot of pain when he first saw him, so he gave him some anti-inflammatory medicine and placed him on light duty. When claimant returned six days later, he complained that his elbow was no better, and Dr. Walker kept him on medication and light duty and also started him in physical therapy. Dr. Walker diagnosed claimant with right elbow strain. Dr. Walker testified that when he last saw claimant on September 28, 2005, he expected that claimant's problems would resolve.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On October 10, 2005, claimant was terminated by respondent for reasons not related to his injury. He was off work several months and then began working for Convoy Trucking (Convoy) as a truck and trailer mechanic in January or February 2006. He worked for Convoy for three or four months before leaving to try to find a higher-paying job. Claimant said that his right elbow bothered him while he worked for Convoy but no more than it was already bothering him, and he did not further injure or aggravate his elbow. He stated that the work at Convoy was lighter work than he had been doing at respondent.

Claimant continued to be treated at Concentra Medical Center. He said that he was released from treatment in October 2005. At that time, his elbow was still swollen. Claimant testified he was told by a doctor that he had some damage but that although he could have surgery to repair the damage, he would lose function in his fingers. Currently, claimant cannot lift or do any kind of physical labor. If he picks up his three-year-old daughter, carries groceries or works on his car, he has pain in his elbow.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on April 7, 2006, at the request of claimant's attorney. Dr. Prostic took a history from claimant and reviewed the medical records from Concentra Medical Center. Claimant reported to Dr. Prostic that he had pain at the inside of his right elbow and numbness going to his ring and little fingers. His condition worsened with repetitious or forceful use of his hand. The numbness would appear predominantly at the end of the workday. Upon examination, Dr. Prostic found claimant had significant tenderness at the medial epicondyle of the right elbow. The remainder of the examination was satisfactory, except for weakness of pronation. He found no heat, swelling, erythema, or atrophy. Claimant's range of motion was full and stability in the elbow was fine. Dr. Prostic diagnosed claimant with medial epicondylitis and mild cubital tunnel syndrome.

Dr. Prostic opined that the activity of using a 20-30 pound sledgehammer for a period of 30 minutes caused claimant's medial epicondylitis. The history of the injury is consistent with claimant's complaints of pain and with swelling of the elbow. There would also be a physiologic basis for claimant's complaint of numbness in his pinkie and ring fingers. Dr. Prostic believed that more probably than not, claimant had some microtears of the flexor pronator tendon origin at the medial epicondyle, and he probably had a local inflammatory response to that. Dr. Prostic believed that claimant had a combination of injuries, epicondylitis and ulnar nerve impairment. Those injuries appear to be permanent injuries. He would expect claimant to have continuing limitations on his ability to lift.

Based on the *AMA Guides*, Dr. Prostic rated claimant as having a 10 percent permanent partial impairment of the right upper extremity. Part of this rating is for the epicondylitis and part for the cubital tunnel syndrome. He said epicondylitis is not specifically in the *AMA Guides*, so he had to go outside the *Guides* to rate it. He rated claimant with a 5 percent permanent partial impairment of the arm for weakness of pronation and 5 percent permanent partial impairment for mild cubital tunnel syndrome.

Dr. Prostin recommended that claimant do gripping exercises and continue use of anti-inflammatory medicines. If claimant's cubital tunnel syndrome would worsen, surgery could be required. He would not put permanent restrictions on claimant. Dr. Prostin believed that claimant's epicondylitis and ulnar entrapment are a result of the incident of August 24, 2005.

Dr. Michael Hall, a board certified orthopedic surgeon, examined claimant at the request of respondent on September 20, 2006. He reviewed the medical records from Concentra Medical Center, the deposition of Dr. Walker, and the report of Dr. Prostin. He took a history from claimant that included the facts of the accident and his job at respondent and at Convoy.

Dr. Hall examined claimant and found he had some tenderness over the medial epicondyle. Claimant had full range of motion of his neck, shoulder, elbow and wrist. There was no instability at the elbow and no swelling. Claimant complained of pain with resisted flexion to the wrist and fingers but nothing with resisted extension. There was a negative Tinel test and a negative compression test of the elbow. Dr. Hall diagnosed claimant with medial epicondylitis. He said that epicondylitis is commonly seen with overuse of the arm. It can be related to one particular incident but is usually a cumulative trauma problem.

Dr. Hall stated that he did not find that claimant had cubital tunnel syndrome. Claimant did not complain of numbness or tingling in his finger tips during his examination on September 20, 2006.

Dr. Hall believed claimant had symptoms of epicondylitis when he worked for respondent. Claimant was treated for the problem and was not having any trouble at his last visit at Concentra. Since claimant did not return after that last visit, he assumed that claimant was having no further problems. After being terminated by respondent, claimant went to work for Convoy as a mechanic, and Dr. Hall believed that claimant's job at Convoy would irritate him as much as his job at respondent had. Dr. Hall stated that claimant did not have pain on October 21, 2005, when he was released by Concentra Medical Center, and he did not work for respondent after that date. He therefore opined that claimant must have done something after that date to make his condition flare up again.

Dr. Hall stated that he would rate claimant with a 0 percent impairment for range of motion. Using the *AMA Guides*, he gave claimant a 2 percent permanent partial impairment to the right upper extremity for some limited extension that he would have had before his employment with Convoy. If he would have rated claimant for what he found on September 20, 2006, he would not have given claimant any impairment rating. Dr. Hall stated he did not give a Jaymar test to determine claimant's grip strength, nor was there any formal testing to determine what, if any, impairment claimant had lifting or with flexion movement.

Although Dr. Hall admitted claimant did not report any increased symptoms from his job at Convoy, he believed that within reasonable medical certainty, claimant's condition can be related to his job at Convoy.

The ALJ found claimant had a 2 percent permanent partial disability at the level of the arm attributable to claimant's August 24, 2005, accident while employed with respondent.² The ALJ reasoned:

Dr. Hall has provided the most current and reasonable opinion of the Claimant's permanent impairment fairly attributable to it (Dep. p. 16) despite his discomfort in attributing it to the Deffenbaugh incident (after August 24, 2005).³

Citing K.S.A. 44-519, the ALJ sustained claimant's objection to the testimony of Dr. Walker regarding the October 21, 2005, examination of claimant because that examination was performed by Dr. Wakwaya, who did not testify. Although that statute is intended to exclude opinions that are not supported by a physician's testimony, it does not prevent a testifying physician from considering the records of another physician in formulating his own opinions.⁴ Furthermore, Dr. Walker is part of the same group as Dr. Wakwaya and those records were a part of his chart.

The Board disagrees with the ALJ's evidentiary ruling that Dr. Walker could not refer to the medical records of Dr. Wakwaya, who did not testify, or use them to formulate his opinions, but the Board otherwise agrees with and affirms the ALJ's findings and conclusions.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated December 5, 2006, and Nunc Pro Tunc dated December 11, 2006, are modified to overrule claimant's objection to the testimony by Dr. Walker as to the October 21, 2005, examination of claimant, but are otherwise affirmed.

IT IS SO ORDERED.

² K.S.A. 44-510d.

³ ALJ Award at 11 (filed Dec. 11, 2006).

⁴ *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997); *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

Dated this _____ day of March, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I find Dr. Prostic's opinion of claimant's functional impairment is the more persuasive. Accordingly, I feel claimant's permanent partial disability benefits should be increased.

BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Steven C. Alberg, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge